A. The Law Commission of Ontario

The Law Commission of Ontario (LCO) is Ontario’s leading law reform agency. The LCO’s mandate is to promote law reform, advance access to justice, and stimulate public debate. The LCO fulfills this mandate through rigorous, evidence-based research; contemporary public policy techniques; and a commitment to public engagement. LCO reports provide independent, principled, and practical recommendations to contemporary legal policy issues. More information about the LCO is available at www.lco-cdo.org.

B. Introduction to the LCO Class Actions Project

This Executive Summary accompanies the LCO’s formal Class Actions Consultation Paper. The Consultation Paper sets out the LCO’s preliminary analysis and questions in this important area of law. The Consultation Paper is available at http://www.lco-cdo.org/classactions.

The LCO’s class action project considers Ontario’s experience with class actions since the Class Proceedings Act (CPA) came into force in 1993. During this period, class actions have grown significantly in volume, complexity, and impact in Ontario and across Canada.

Class action lawsuits often involve thousands – if not hundreds of thousands – of potential litigants and millions – if not billions – of dollars in compensation. They can result in huge awards and have a significant impact on the general public, corporate or government behavior and reputations, public policy, and the justice system. It is fair to describe class actions as one of the most high-profile and far-reaching legal procedures in the Canadian justice system.

The LCO class action project is an independent, evidence-based, and practical analysis of class actions from the perspective of their three objectives: access to justice, judicial economy, and behavior modification.

C. Catalysts for Reform

The LCO launched this project for several reasons:

- **The project is timely:** Ontario’s statutory regime governing class actions took shape as a result of a comprehensive and thoughtful law reform process that culminated twenty-five years ago in the enactment of the CPA. The LCO project will be the first comprehensive assessment of Ontario’s CPA in more than a generation.

- **The project addresses outstanding, systemic, and controversial justice policy issues:** Class actions also have systemic implications for access to justice, court procedures and efficiency, and government and corporate liability.

- **There is a need for an impartial, independent review of class actions:** Class action discussions are controversial and often influenced by stakeholder interests and perspectives. This project is unique in that the LCO is independent of those interests and committed to an impartial, independent, “public interest” analysis of class action issues.

- **The project is participatory and evidence-based:** There is a comparative lack of comprehensive consultations and empirical research on class actions issues. The LCO project will address these gaps by conducting extensive public consultations and providing a firmer empirical foundation for these issues.
D. Project Outline

The Terms of Reference for the project are available at http://www.lco-cdo.org/classactions.

The project’s goal is to produce an independent, evidence-based, and comprehensive analysis of important class action issues. The project is also organizing an empirical study of class actions in Ontario.

The Consultation Paper asks important questions about a broad range of class actions issues, including questions respecting access to justice, delay, costs, settlement distributions, lawyers’ fees, certification of class actions, carriage issues, etc. The answers to these questions are neither obvious nor easy. Nor is there a consensus among class action stakeholders or policy-makers about how they should be addressed.

The LCO’s final report will make recommendations for law reform where appropriate to do so. The final report will be produced in English and French and distributed widely. The LCO will also produce a range of user-friendly, accessible, and web-based materials that summarize and explain the final report and its recommendations.

E. How to Get Involved

The LCO believes successful law reform depends on broad and accessible consultations with a broad range of Ontarians.

The release of the Consultation Paper launches an intensive period of public engagement. During this period, the LCO will organize consultations with members of the public, lawyers and legal organizations, public and private organizations, academic, governments and others have an interest in class actions. Our consultations are likely to include meetings, conference calls, webinars, focus groups, and roundtables. Important project documents will be distributed in English and French.

There are many ways for Ontarians to get involved. Ontarians can:

- Learn about the project and sign up for project updates at https://www.lco-cdo.org/classactions
- Contact the LCO to ask about the project or its consultations, or
- Provide written submissions or comments.

Please note the consultation deadline is May 31, 2018.

The LCO can be contacted at:

Law Commission of Ontario
Osgoode Hall Law School, York University
2032 Ignat Kaneff Building
4700 Keele Street
Toronto, ON M3J 1P3

Telephone: 416-650-8406
Toll free: 1-866-950-8406
Email: lawcommission@lco-cdo.org
Web page: www.lco-cdo.org
Twitter @LCO_CDO
F. Project Organization

The class actions project is being led by the LCO with the support of a distinguished group of academics, justice system leaders, and class action practitioners.

The project’s Principal Researchers are:
Professor Jasminka Kalajdzic, Faculty of Law, University of Windsor; and,
Professor Catherine Piché, Faculty of Law, Université de Montréal.

In addition, the LCO established an expert Reference Group to assist the project’s work. The reference group members are:
The Honourable Stephen T. Goudge, Chair and Board of Governors Liaison
Marie Audren, Partner, Audren Rolland LLP
Tim Buckley, Partner, Borden Ladner Gervais LLP
Michael A. Eizenga, Partner, Bennett Jones LLP
Professor Trevor C. W. Farrow, Osgoode Hall Law School
André Lespérance, Partner, Trudel, Johnston and Lespérance
Celeste Poltak, Partner, Koskie Minsky LLP, and
Linda Rothstein, Partner, Paliare Roland Rosenberg Rothstein.

Funding for the project is being provided by the LCO. The project is also supported by the Faculty of Law, University of Windsor and the Faculty of Law at the Université de Montréal Class Action Lab. Additional project funding is being provided by the Ontario Ministry of the Attorney General and the Government of Canada through the Justice Partnership and Innovation Program.

G. Consultation Issues and Questions

The LCO’s Class Action Consultation Paper is divided into three sections:

1. Chapters 1, 2 and 3 are introductory. Chapter 3 summarizes the results of 60 preliminary or “Stage One” consultations undertaken by the LCO on this project. The LCO’s Stage One interviews revealed both strengths and weaknesses of the current system. These insights, coupled with practical and theoretical experience of the project’s principal researchers, have led the LCO to develop the consultation questions and research priorities set out in this paper.

2. Chapter 4 summarizes the LCO’s class action consultation issues and questions. Generally speaking, the questions ask whether the three class actions objectives – access to justice, judicial economy, and behavior modification — are being met and whether reforms are necessary to address systemic issues in Ontario’s class action system.

3. Chapter 5 of the Paper describes the LCO’s class actions empirical project and asks if or how law reform initiatives can improve evidence-based decision-making on class actions issues.

Readers should note that the issues and questions identified in the Executive Summary and Consultation Paper are neither final nor exhaustive. Ontarians are welcome to make submissions on any additional topic they believe is important to this project.
1. Delay

Class actions are a major part of the administration of civil justice in Ontario. Class actions require tremendous judicial resources and have unique features that affect the ability of class litigants to have their cases prosecuted in a reasonable timeframe. Delays in class actions are systemic and can be attributed to multiple pre-certification motions (to strike, to amend, particulars); scheduling challenges; significant discoveries (often burdensome and expensive e-discoveries); interlocutory appeals; and the inherent complexity and novelty of the claims litigants have been pursuing in this context.

Consultation Question 1:

How can delay in class actions be reduced?
• How may practices be changed to shorten delays?
• How might judges manage cases more efficiently?
• Should the statutory deadline for filing of a certification motion, or any other deadline applicable in class action practice, be changed?
• What changes in legislation could help cases proceed more efficiently?

2. Settlement Distribution and Transparency of Outcomes

Class actions must provide substantive outcomes to the members. Accordingly, distribution processes are fundamental. Courts, counsel, policy-makers, class members and the general public have an interest in knowing how class funds are distributed and what sum or proportion of class funds are distributed. Information about class action outcomes is crucial to the credibility of class actions and whether they are meeting their objectives.

Consultation Question 2:

Given that class actions must provide access to compensation to class members, how should distribution processes be improved?
• What are the best practices for distributing monetary awards to members?
• How can transaction or agency costs be reduced in distributions?
• Is transparency important in class actions? If so, how can reporting and monitoring be improved?
• Should judges require parties or claims administrator to file a public report summarizing the outcomes of the settlement distribution after its conclusion? What should the report contain?
• Should the CPA be amended to specify more detailed requirements regarding distribution practices, improved monitoring, or reporting?
3. Costs
The suitability of two-way costs in a class action regime has long been a topic of debate. Interviewees were not unanimous that costs should be revisited in the class action context. Some felt strongly that the costs barrier deters meritorious, smaller damages actions. Others expressed concern about the unpredictability of costs, and the indemnity provided by funders, be it the Class Proceedings Fund or a commercial lender, reduces the sum of money ultimately paid to the class. Still others worried that eradicating costs would provide incentives to well-resourced litigants to bring unnecessary interlocutory motions, and weak claims.

Consultation Question 3:
What changes, if any, should be made to the costs rule in the CPA?
• Should Ontario retain the two-way costs rule?
• Is the cost of indemnities against adverse costs a concern?
• Should the Class Proceedings Fund have the flexibility to alter its current 10% levy and/or to fund legal fees?
• Is third party funding a positive development in class action practice? Should it be more tightly regulated?
• Should the source and extent of funding be disclosed to courts?

4. Plaintiff Counsel Fees
Lawyers’ fees in class actions have at times been a lightning rod for controversy. A common complaint is that class counsel appear to earn millions while individual class members receive comparatively little. This situation often generates cynicism and public distrust of class action and plaintiff counsel.

Consultation Question 4:
Is the current process for settlement and fee approval appropriate?
• Is the legal test for settlement approval sufficient?
• Which factors should a court consider in awarding counsel fees?
• Should counsel fees be proportional to or dependent upon class recoveries?
• Should fees be awarded on a sliding scale, that is, a reduced percentage of recovery as the size of recovery increases?
• What changes, if any, should be made to the process by which fees are awarded?
• Is there a role for an amicus curae at settlement and/or fee approval?
5. Certification

Certification is a key moment in the life of a class action. Most interviewees, including some defence lawyers, stated they did not believe reform of section 5 of the CPA was warranted. Several interviewees, however, stated that clarity was needed as to how the section 5 test is approached. Some interviewees submitted that a predominance requirement should be added to section 5, along with a higher standard of proof. Most, however, including some defence counsel, cautioned against radical reform of section 5.

Consultation Question 5:

*Is the current approach to certification under s. 5 of the CPA appropriate?*
- What is the appropriate evidentiary standard at the certification motion?
- Should courts consider the merits of a proposed class action at certification?
- Should Ontario move in the direction of Québec by requiring only a limited evidentiary basis at the motion for certification?
- Should Ontario abandon the requirement for certification, or preliminary hearings altogether?

6. Behaviour Modification

Behaviour modification is one of the three main objectives of class proceedings, both in Ontario and in the rest of Canada. Notwithstanding its importance as a policy objective in the class action regime, little is known about the extent to which defendants are either specifically or generally deterred from wrongdoing as a result of class actions.

Consultation Question 6:

*Are class actions meeting the objective of behaviour modification? What factors (or kinds of cases) increase (or reduce) the likelihood of behaviour modification?*

7. The Perspectives of Class Members

Class action research typically focusses on critiques of the case law and judicial interpretations of the CPA. Where the actors in the system are studied, it is usually the lawyers (for example, questions related to compensation for risks, or incentives for collusion, etc.) and the parties being sued. Rarely, if ever, are the perspectives of class members investigated. Recent access to justice research has focussed on ‘bottom-up’ analysis, a public-centered model that puts the residents of the province, not lawyers, judges and policymakers, squarely at the centre of justice reform.

Consultation Question 7:

*Please describe class members’ and representative plaintiffs’ experience of class actions:*
- How can class action processes be improved for class members and representative plaintiffs?
- Are there certain kinds of disputes or legal problems that class actions are not addressing?
- How can technology be used to keep class members better informed?
- Should the CPA include specific provisions regarding the rights of objecting class members to disclosure, representation and entitlement to costs?
8. Multi-Jurisdictional Class Actions

The commencement of multiple, duplicative or overlapping national class actions has become frequent, and courts are increasingly being asked to resolve overlapping class proceedings filed in multiple jurisdictions. Many recent efforts, including court decisions, initiatives from Uniform Law Commission of Canada and the Canadian Bar Association. Some provinces have also amended their class proceedings legislation to manage multi-jurisdictional class actions more effectively.

Consultation Question 8:

*In light of existing constitutional restrictions, what is the most effective way for courts to case manage multi-jurisdictional class actions in Canada?*

- Is the 2018 CBA Protocol sufficient to address multi-jurisdictional class actions?
- Is statutory guidance desirable, or should this issue be left to the courts?
- Should legislative amendments like those in the Saskatchewan and Alberta statutes be considered?

9. Carriage Within Ontario

In class proceedings, carriage hearings occur when multiple lawyers seek to be recognized as official counsel for a large group of absent, non-participating class members. Carriage motions are often being brought which is resulting in increased delays and inefficiency in the judicial system.

Consultation Question 9:

*How should Ontario courts address the issue of carriage in class actions?*

- Should a modified “first to file” rule be considered in Ontario?
- Should the CPA be amended to provide guidance on carriage issues? If so, what reforms would you recommend?

10. Leave to Appeal

The majority of those interviewed in Stage One agreed the current CPA procedure governing appeals should be reviewed.

Consultation Question 10:

*What is the appropriate process for appealing class action certification decisions?*

- Should appeals from successful certification decisions be taken directly to the Divisional Court, without the need to obtain leave?
- Should all appeals from certification decisions proceed directly to the Court of Appeal? Is the leave to appeal test appropriate?

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1 “Multi-jurisdictional class actions” are synonymous to “national class actions” in this context. However, for some “multi-jurisdictional class actions” is a more accurate term because those actions do not always span the entire country.
11. Pre-Trial Issues
Although the majority of certified class actions ultimately settle, several dozen cases have gone to trial in Ontario in the past twenty-five years. Lawyers taking class actions to trial face challenges in adapting civil procedure and rules of practice designed for individual litigation to the class action context.

Consultation Question 11:
What best practices would lead a case more efficiently through discoveries, to trial and ultimately to judgment? Are there unique challenges in trials of common issues that the CPA and/or judges could address? What can judges do to facilitate quicker resolutions and shorter delays?

12. Other Issues
The CPA is more than 25 years old. Since that time, courts have considered several issues that were not contemplated by the CPA’s drafters. The LCO has prioritized its consultation and research agenda to the topics set out in this paper, with a focus on whether the three objectives of class actions are being achieved. That said, it is possible that this paper does not address an issue or matter that may be important in class actions. As a result, the LCO invites comments and submissions on issues that are not included in this paper.

Consultation Question 12:
In addition to the issues listed in this paper, are there provisions in the CPA that need updating to more accurately reflect current jurisprudence and practice? If so, what are your specific recommendations?

13. Empirical Data and Improved Decision-Making
The CPA is 25 years old. The LCO believes it is time to ask if, or how, the Act should be amended to promote better data collection, evidence-based policy-making, transparency, and “open data.”

Consultation Question 13:
Should the Class Proceedings Act or Rules of Civil Procedure be amended to promote mandatory, consistent reporting on class action proceedings and data?
• What information should be collected?
• How can barriers or disincentives to better data collection be reduced?
• How can technology be used to facilitate greater data collection and reporting?